U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUL 3 1 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Rachel Nitsuya for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a charitable organization. It seeks to permanently employ the beneficiary in the United States as a controller. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

The issues in this case are whether the beneficiary possesses an advanced degree as required by the terms of the labor certification and the requested preference classification, and whether the petitioner has established its ability to pay the beneficiary the proffered wage.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[1] The priority date of the petition is July 12, 2012.[2]

Part G of the labor certification reflects that the proffered wage for the offered position is $76,565.00 per year.

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4.	Education: Master's.
H.4.B.	Major field of study: Business Administration or related.
H.5.	Training: None required.
H.6.	Experience in the job offered: None required.
H.7.	Alternate field of study: Accepted.
H.7.A.	Major field of study: Accounting.
H.8.	Alternate combination of education and experience: None accepted.
H.9.	Foreign educational equivalent: Accepted.
H.10.	Experience in an alternate occupation: None accepted.
H.11.	Specific skills or other requirements: Manage and direct budget process, annual nonprofit financial return reporting, financial statements and forecasts, company activity reports and accounting processes of the company; Oversee operating, capital and cash flow budgets, and ensure that expenditures do not

[1] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).
[2] The priority date is the date DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

> exceed budgetary limits; Monitor business operations, trends, costs, revenues, financial commitments, and obligations, to project future revenues and expenses or to provide advice; Analyze and interpret financial results in order to provide advice; Coordinate activities in keeping books and records, including maintaining general ledger and related systems for accounts receivable, accounts payable, and payroll. [sic]

Part J of the labor certification states that the beneficiary possesses a master's degree in international business from , completed in 2011. The record contains a copy of the beneficiary's diploma that establishes she was awarded a Master of Science in International Business on June 10, 2011 from The diploma is accompanied by the beneficiary's academic transcript, signed by the registrar for and dated June 29, 2011.

The director denied the petition based on his determination that the record did not establish that the beneficiary held a master's degree from an accredited university or college in the United States, as required for classification as an advanced degree professional under section 203(b)(2) of the Act. He further concluded that the petitioner had not demonstrated its ability to pay the beneficiary the proffered wage. The director denied the petition accordingly.

On appeal, counsel for the petitioner asserts that United States Citizenship and Immigration Services (USCIS) erred in finding that the beneficiary does not have a master's degree, as that degree is defined by the regulation at 8 C.F.R. § 204.5(k)(2). Counsel also contends that the petitioner has provided clear and convincing evidence of its ability to pay the proffered wage.

The petitioner's appeal makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.[3] The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[4] A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.[5]

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[3] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[4] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[5] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

II. BENEFICIARY QUALIFICATIONS

The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and USCIS in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[6] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . .
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did

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[6] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
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> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

Eligibility for the Classification Sought

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
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> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

The beneficiary possesses a Master of Science in International Business from , which has not been accredited by a recognized accrediting agency. For the reasons set forth below, a degree from an unaccredited institution will not be considered an advanced degree under 8 C.F.R. § 204.5(k)(2).

In the United States, institutions of higher education are not authorized or accredited by the federal government.[7] Instead, the authority to issue degrees is granted at the state level. However, state approval to operate is not the same as accreditation by a recognized accrediting agency.

According to the U.S. Department of Education (DOE), "[t]he goal of accreditation is to ensure that education provided by institutions of higher education meets acceptable levels of quality."[8] Accreditation also ensures the nationwide recognition of a school's degrees by employers and other institutions, and also provides institutions and its students with access to federal funding.

Accrediting agencies are private educational associations that develop evaluation criteria reflecting the qualities of a sound educational program, and conduct evaluations to assess whether institutions meet those criteria.[9] Institutions that meet an accrediting agency's criteria are then "accredited" by that agency.[10]

The DOE and the Council for Higher Education Accreditation (CHEA) are the two entities responsible for the recognition of accrediting bodies in the United States. While the DOE does not accredit institutions, it is required by law to publish a list of recognized accrediting agencies that are deemed reliable authorities as to the quality of education provided by the institutions they accredit.[11]

The CHEA, an association of 3,000 degree-granting colleges and universities, plays a similar oversight role. The presidents of American universities and colleges established CHEA in 1996 "to strengthen higher education through strengthened accreditation of higher education institutions."[12] CHEA also recognizes accrediting organizations. "Recognition by CHEA affirms that standards and

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[7] *See* http://ope.ed.gov/accreditation (accessed July 29, 2013).
[8] *See* http://www2.ed.gov/print/admins/finaid/accred/accreditation.html (accessed July 29, 2013).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *See* www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf (accessed July 29, 2013).

processes of accrediting organizations are consistent with quality, improvement, and accountability expectations that CHEA has established."[13] According to CHEA, accrediting institutions of higher education "involves hundreds of self-evaluations and site visits each year, attracts thousands of higher education volunteer professionals, and calls for substantial investment of institutional, accrediting organization, and volunteer time and effort."[14]

The DOE and CHEA recognize the Western Association of Schools and Colleges (WASC), Accrediting Commission for Senior Colleges and Universities as the accrediting association with jurisdiction over California.[15] The WASC website lists all accredited institutions within its jurisdiction, and is not named as one of the accredited institutions. *See* http://www.acswasc.org/ (accessed July 29, 2013). Therefore, has not been accredited by a recognized accrediting agency.

On appeal, counsel contends that the beneficiary does hold the requisite master's degree as the regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as any U.S. academic or professional degree or foreign equivalent degree above that of baccalaureate. Counsel asserts that the current statute does not require that an advanced degree be from an accredited institution and that the director, therefore erred in relying on *Matter of Yau*, 13 I&N Dec. 75 (Reg'l Commr 1968) and *Tang v. INS*, 298 F.Supp. 413 (C.D. Cal. 1969). Counsel further states that the has been certified by the Student and Exchange Visitor Program (SEVP) operated by U.S. Immigration and Customs Enforcement (ICE), Department of Homeland Security (DHS) and that USCIS approved the beneficiary's student visa to study for her master's degree at Counsel states that it would be inequitable for USCIS to reject the beneficiary's master's degree from a school that has been certified to issue advanced degrees to foreign students. Counsel also points out that is accredited by the Bureau for Private Postsecondary Education (BPPE) of the State of California.

In support of these claims, counsel submits a printout from the ICE website, which reflects that it has authorized to accept international students. Counsel also provides a printout from the BPPE website that establishes it has approved the master's program in international business at and a letter from a student advisor at who states that the university is a SEVP-certified school and that it has also been approved by the California Bureau for Private Postsecondary and Vocational Education.

While the AAO acknowledges that is SEVP-certified and has been approved to operate its master's program in international business in California by the BPPE, the fact remains that it is an unaccredited institution. The State of California acknowledges that

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[13] *Id.*
[14] *Id.*
[15] *See* http://www.chea.org/Directories/regional.asp (accessed July 29, 2013).

"accreditation as an indication of the quality of education offered," and that institutions "must be accredited by an agency recognized by the [DOE] in order for it or its students to receive federal funds." *See* http://www.cpec.ca.gov/x_collegeguide_old/accreditation.asp (accessed July 29, 2013). California's Education Code states that approval to operate in California is granted after the BPPE has verified that the institution "has the capacity to satisfy the minimum operating standards." Cal. Ed. Code section 94887.

Accreditation provides assurance of a basic level of quality of the education provided by an institution as well as the nationwide acceptance of its degrees. A degree from a state approved institution that is unaccredited does not provide a sufficient assurance of quality. Therefore, since the beneficiary's Master of Science in International Business from is not from an accredited institution of higher education, it does not qualify as an advanced degree within the meaning of 8 C.F.R. § 204.5(k)(2).

Counsel's claim that the beneficiary's degree from should be accepted as an advanced degree because it is SEVP-certified is also unpersuasive. The approval of an institution to enroll nonimmigrant foreign students pursuant to 8 C.F.R. § 214.3 is unrelated to the requirements for immigrant classification as an advanced degree professional. A broad range of educational institutions may be approved to enroll foreign students, including community colleges, junior colleges, seminaries, conservatories, high schools, elementary schools, and institutions which provide language training, instruction in the liberal arts or fine arts, and/or instruction in the professions. *Id.* The fact that an institution is authorized to enroll nonimmigrant students does not mean that its degrees meet the requirements of an advanced degree under 8 C.F.R. § 204.5(k)(2).

However, the AAO does concur with counsel's assertion that *Matter of Yau* and *Tang v. INS* do not directly apply to the instant appeal.[16] Nonetheless, for the reasons explained above, the beneficiary is not eligible for classification as an advanced degree professional based on a degree from an unaccredited institution.

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary possesses at least a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty. Therefore, the beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act.

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[16] The holding of these cases pertains to the former Group II, Schedule A blanket certification regulations which specifically required a degree from an accredited U.S. college or experience or a combination of experience and education equivalent to such a degree.

The Minimum Requirements of the Offered Position

The petitioner must also establish that the beneficiary satisfies all of the educational, training, experience and any other requirements of the offered position as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I &N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification. Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. *See Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 *7 (D. Or. Nov. 30, 2006).

In the instant case, the labor certification states that the only requirement for the offered position is a master's degree in business administration or a related field, or accounting. For the reasons explained above, the petitioner has failed to establish that the beneficiary possesses the required degree. Therefore, the record does not demonstrate that the beneficiary met the minimum requirements of the offered position set forth on the labor certification by the priority date.

III. ABILITY TO PAY THE PROFFERED WAGE

Demonstrating Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability

> to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

A petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. *See* 8 C.F.R. § 204.5(d). Here, as previously noted, priority date of the ETA Form 9089 is July 12, 2012. The proffered wage, as stated on the ETA Form 9089, is $76,565.00 per year.

The evidence in the record of proceeding shows that the petitioner is a tax exempt corporation. The petitioner indicated on Form I-140, Immigrant Petition for Alien Worker, at part 5, section 2 that the organization was established in 1986 and employs nine workers. According to the 2011 federal tax return in the record, the petitioner's fiscal year is based on a calendar year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Act. Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining a petitioner's ability to pay, USCIS first examines whether the petitioner was employing the beneficiary as of the date on which the labor certification was accepted for processing by DOL. If the petitioner documents that it has employed the beneficiary at a salary equal to or greater than the proffered wage during the required period, that evidence is considered *prima facie* proof of the petitioner's ability to pay pursuant to 8 C.F.R. § 204.5(g)(2). If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS then examines the net income figure reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Filed Nov. 10, 2011).[17] If the

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[17] Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang. v. Thornburgh,* 719 F. Supp. 532 (N.D. Texas

petitioner's net income during the required time period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where neither an employer's net income nor its net current assets establish a consistent ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of a petitioner's business activities. *Matter of Sonegawa* at 612. In assessing the totality of the petitioner's circumstances to determine ability to pay, USCIS may look at such factors as the number of years a petitioner has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

In the present case, the petitioner has submitted no documentation, including Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements (W-2s), to establish the beneficiary's annual income, although the ETA Form 9089 indicates that it began employing her on November 21, 2011. Therefore, the petitioner cannot establish its ability to pay based on the wages earned by the beneficiary and the AAO will consider whether the record demonstrates that its net income or net current assets equal or exceed the proffered wage.

The record before the director closed on October 30, 2012 with the receipt of the petitioner's response to the director's request for evidence. As of that date, the petitioner's 2012 federal income tax return was not yet due. As a result, the petitioner's income tax return for 2011 is the most recent return available.

The petitioner does not assert that its net income is sufficient to cover the proffered wage.[18] Instead, counsel for the petitioner contends that its net current assets of $152,007.00, as reflected in its 2011 Form 990, Return of Organization Exempt from Income Tax, and $746,542.55, as reported in the 2012 interim balance sheet submitted on appeal, demonstrate its continuing ability to pay the proffered wage. Counsel also submits the petitioner's bank statements for the period June 1 through September 28, 2012, which, he states, reflect balances in excess of the proffered wage and corroborate the petitioner's ability to pay.

While the AAO notes counsel's assertion that the instant Form 990 establishes that the petitioner had $152,007.00 in net current assets in 2011, it does not agree. A Form 990 does not permit a filer to identify its net current assets and counsel's assertion that USCIS should derive this figure from the financial information provided in Part X of the Form 990 is unpersuasive, as is the November 13,

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1989); K.*C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

[18] The petitioner's 2011 Form 990, at line 19, reports negative net revenue of $92,805.00.

2012 statement from a certified public accountant supporting such a computation. Accordingly, the AAO does not find the petitioner's Form 990 to establish its net current assets in 2011.

The interim balance sheet submitted on appeal, which reflects the petitioner's assets and liabilities as of October 31, 2012, is also insufficient to demonstrate the petitioner's net current assets in 2012. Although the AAO notes the financial information provided by this document, it observes that the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management and are insufficient to demonstrate an ability to pay the proffered wage. In the present case, the AAO cannot conclude that the submitted balance sheet has been audited. Moreover, the submitted balance sheet provides only an interim computation of the petitioner's assets and liabilities, rather than the petitioner's financial status as of the end of 2012.

The AAO also finds counsel's reliance on the balances reflected in the petitioner's 2012 bank statements to be misplaced. Bank statements are not included among the three types of evidence, enumerated in 8 C.F.R. 204.5(g)(2). Although, as counsel asserts, USCIS does consider additional material in appropriate cases, the petitioner in this case has not indicated that the documentation specified at 8 C.F.R. 8 204.5(g)(2) is inapplicable in this case or otherwise paints an inaccurate financial picture of its financial status. Further, the submitted bank statements demonstrate only the amount of money the petitioner had in its account on a given date, not a sustainable ability to pay the proffered wage.

The record does not establish the petitioner's ability to pay based on its net income or net current assets. Therefore, the AAO will consider whether the totality of the petitioner's circumstances establish its ability to pay the beneficiary the proffered wage, pursuant to *Matter of Sonegawa*.

In *Sonegawa*, the petitioning entity had been in business for more than 11 years and routinely earned a gross annual income of approximately $100,000.00. However, during the year in which the petition was filed in that case, the petitioner's income declined significantly as a result of changing business locations and paying rent on both the old and new locations for five months. There were also significant moving costs and a period of time when the petitioner was unable to do regular business. The legacy Immigration and Naturalization Service (now USCIS) nevertheless found that the petitioner's prospects for resuming successful business operations had been established as the record demonstrated that she was a fashion designer whose work had been featured in national magazines, that she had a client list that included celebrities and individuals who appeared on lists of the best-dressed California women, and that she was a lecturer on fashion design at design and fashion shows throughout the United States, and at colleges and universities in California.

In the present case, the record does not establish that the totality of the petitioner's circumstances provide it with the ability to pay the proffered wage. Unlike the evidence submitted in *Sonegawa*, the evidence of record in the present case provides no context in which to consider the petitioner's ability to pay. It does not establish the petitioner's financial history since its 1986 founding, nor

demonstrate its growth during these years. Thus, the AAO cannot conclude that the totality of the petitioner's circumstances demonstrate a continuing ability to pay the proffered wage. Accordingly, the evidence of record does not establish the petitioner's ability to pay the proffered wage from the priority date onward.

IV. CONCLUSION

In summary, the petitioner has failed to establish that the beneficiary possessed an advanced degree as required by the terms of the labor certification and the requested preference classification. Therefore, the beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act.

The petitioner has also failed to demonstrate its ability to pay the proffered wage from the July 12, 2012 priority date onward, as required by the regulation at 8 C.F.R. § 204.5(g)(2). The director's decision will, therefore, be affirmed.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.